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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 6663
DATE COMPLAINT FILED: October 9, 2012
DATE OF NOTIFICATION: October 12, 2012
DATE OF LAST RESPONSE: October 24, 2012
DATE ACTIVATED: November 7, 2012

EXPIRATION OF SOL: August 6, 2017 -
September 30, 2017

COMPLAINANT: Robert Harms, Treasurer
North Dakota Republican Party

RESPONDENTS: Crabtree for PSC
Perry Miller in his official capacity as treasurer
Brad Crabtree

RELEVANT STATUTES
AND REGULATIONS: 2 U.S.C. § 434(f)
2 U.S.C. § 441d
11 C.F.R. § 100.29
11 C.F.R. § 104.5(j)
11 C.F.R. § 104.20
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED: Disclosure Reports

OTHER AGENCIES CHECKED: None

I. INTRODUCTION

Complainant alleges that a candidate for the North Dakota Public Service Commission, his committee for that election, and the committee's treasurer, failed to disclose an electioneering communication that allegedly attacked a sitting member of the Public Service Commission, who was also a candidate for Congress. Respondents assert that the communication, a radio advertisement, was exempt from regulation because the communication

1 was entirely focused on a state election, a non-federal committee paid for it, and the
2 communication did not promote, support, attack or oppose ("PASO") a federal candidate. We
3 recommend that the Commission find no reason to believe that the Respondents violated the
4 Federal Election Campaign Act, as amended, ("FECA" or the "Act") or Commission
5 regulations and close the file.

6 II. FACTS

7 Brad Crabtree was a candidate in the November 6, 2012 election for a vacant seat on
8 North Dakota's three-member Public Service Commission ("PSC"), the agency that regulates
9 North Dakota's public utilities. Crabtree for PSC was his state campaign committee for that
10 election, and Perry Miller was the treasurer of Crabtree for PSC. Kevin Cramer, one of the two
11 incumbent commissioners on the PSC, was also a candidate for North Dakota's sole
12 congressional district in the general election. Cramer filed his Statement of Candidacy with the
13 Commission on October 27, 2011.

14 Crabtree for PSC produced a 30-second radio advertisement that was broadcast on
15 various North Dakota radio stations during the period between August 6 and September 30,
16 2012. The advertisement featured Crabtree stating:

17 I'm Brad Crabtree, candidate for Public Service Commissioner. I believe
18 you deserve more from your public officials. It's wrong for regulators to
19 take political money from interests they regulate. But Public Service
20 Commissioners Kevin Cramer and Brian Kalk have taken thousands of
21 dollars from the very companies and executives whose projects they
22 approve. Our PSC Commissioners are supposed to watch out for folks
23 like you, not just the people who sign the checks.
24

25 That's why I've pledged not to accept any contributions from companies
26 or executives with interests before the PSC. It's not what candidates say,
27 but what they do that matters. See for yourself at crabtreeforpsc.com
28 where I post the contributions my campaign receives.
29

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1 I'm Brad Crabtree, candidate for Public Service Commissioner. I'd
2 appreciate your vote to help me put you – the public – back into the
3 Public Service Commission.
4

5 Get the rest of the story at crabtreeforpsc.com. Paid for by Crabtree for PSC,
6 Perry Miller, Treasurer.
7

8 Compl., Attach 1.

9 The Complaint alleges that the advertisement was an undisclosed electioneering
10 communication because the advertisement expressly attacks Cramer, a candidate for federal
11 office, was publicly distributed within 60 days of the November 6 general election, and was
12 targeted to the relevant electorate. It further states that Crabtree is not eligible for the
13 "exemption available to state and local candidates" because the advertisement attacked or
14 opposed Cramer.

15 In support of its allegation, the Complaint provided a list of disbursements to radio
16 stations showing that Crabtree for PSC paid a total of \$28,304.40 to air the advertisement.¹
17 Compl., Attach 2. The disbursements are each broken down by date ranges of ten to 15 days.
18 As shown in the tables below, \$5,913.10 of the disbursements made for the advertisement aired
19 during periods of time that are entirely within the 60-day electioneering communication window
20 of September 7 through November 5. *See* Table 1, *infra*. An additional \$5,163.20 in
21 disbursements for the advertisement aired during a 12-day period, of which only one day

¹ In an effort to verify the reliability of the list, the Office of Complaints Examination and Legal Administration ("CELA") contacted the Complainant by telephone to inquire about the source of the disbursement information. Complainant informed CELA that the North Dakota Republican Party's media vendor obtained the information directly from the radio stations, but he offered no other details or documents, and instead asked that we "exercise[] some discretion" and "refrain [] from further prosecution of the complaint" because complainant now believes that the violations were "inadvertent." E-mail from Robert Harris, Treasurer, N.D. Repub. Party, to Jeffrey S. Jordan, Supervisory Att'y, FEC (Jan. 14, 2013).

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- 1 (September 7) is inside the electioneering communication window. *See* Table 2, *infra*.² Finally,
2 \$15,728.10 in disbursements were for the advertisement that aired completely outside the
3 electioneering communication window. *See* Table 3, *infra*.

Table 1: Ads Broadcast Within Electioneering Communication Window		
Radio Stations	Broadcast Dates	Broadcast Costs
KMJO FM	9/18-9/28	\$617.10
KFGO AM	9/18-9/28	\$1,224.00
KBVB FM	9/18-9/28	\$1,428.00
KFYR & KBSS & KQDY	9/17-9/30	\$1,589.00
KCJB	9/18-9/28	\$476.00
K1ZZ	9/18-9/28	\$579.00
	TOTAL	\$5,913.10

Table 2: Ads Broadcast Partially Within Electioneering Communication Window		
Radio Stations	Broadcast Dates	Broadcast Costs
KCJB	8/28-9/7	\$499.00
K1ZZ	8/28-9/7	\$226.00
KMJO FM	8/27-9/7	\$504.00
KFGO AM	8/27-9/7	\$1,652.40
KBVB FM	8/27-9/7	\$1,332.80
FBVR AM	8/27-9/7	\$960.00
KSSS	8/27-9/7	\$494.00
KQDY	8/27-9/7	\$495.00
	TOTAL	\$6,163.20

² An expense identified by Complainant to KOVC AM, for \$500, for an invoice covering August 30-September 7 was excluded from our calculations because this radio station does not reach 50,000 or more listeners. *See* 11 C.F.R. § 100.29(c)(6)(i). We confirmed that each of the other radio stations that broadcast the advertisement is capable of reaching 50,000 or more persons in North Dakota, the relevant electorate. *Id.*

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Table 3: Ads Broadcast Outside Electioneering Communication Window		
Radio Stations	Broadcast Dates	Broadcast Costs
KQDY	8/8-8/21	\$1,092.00
KFYR	8/8-8-21	\$1,380.00
KNOX	8/6-8/19	\$2,500.00
KMJO	8/7-8/17	\$1,239.30
KFGO AM	8/7-8/19	\$5,530.10
KCJB	8/8-8/17	\$662.00
K1ZZ	8/8-8/17	\$361.00
KSIB & KSIZ	8/9-8/22	\$1,001.30
KOVC & KQDJ	8/15-8/29	\$1,000.00
KQDJ	8/30-9/6	\$200.00
KLTC & KCAD	w/o 9/5	\$762.40
	TOTAL	\$15,728.10

Respondents seek dismissal of the Complaint on the grounds that the advertisement related to a state election over which North Dakota law has exclusive jurisdiction.³ Resp. at 3. The response further claims that the communication is exempt from Commission regulation because it does not constitute "federal election activity" as defined by FECA, and because the communication qualifies for the "state or local candidate" exemption to the electioneering communications rules under 11 C.F.R. § 100.29(c)(5) – because it was paid for by a state candidate in connection with a state election and does not PASO a federal candidate. *Id.* at 2-4. The Response charges that the Complaint omits "material facts" concerning the circumstances of the election and the related advertisement, including that Cramer, along with Brian Kalk, were sitting members of the PSC who had a practice of accepting contributions from the regulated community and that a criticism of Cramer's and Kalk's practice was a "signature

³ Respondents' claim that this ad is exclusively governed by North Dakota law is addressed by the plain language of the "state and local candidate" exemption, under 11 C.F.R. § 100.29(c)(5), which indicates that generally only ads that PASO a federal candidate are reportable under FECA.

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1 issue" in Crabtree's campaign.⁴ *Id.* at 2. Thus, Respondents argue, when viewed in this
2 context, it is apparent that the communication was focused exclusively on Crabtree's effort to
3 be elected to the PSC and did not attack Cramer as a federal candidate or oppose Cramer's
4 congressional candidacy. *See Resp.* at 2-3. In their view, the advertisement criticizes Cramer
5 solely in his role as an incumbent PSC commissioner and that "any unmentioned connotation or
6 inference" to Crabtree's federal candidacy was "merely incidental." *Id.* at 2-3 & 5.

7 **III. LEGAL ANALYSIS**

8 The Complaint alleges that Respondents violated the Act by airing an electioneering
9 communication that cost in excess of \$10,000 without filing a required 24 Hour Notice of
10 Disbursements for Electioneering Communications (FEC Form 9) ("24 Hour Notice"). An
11 electioneering communication is a broadcast, cable, or satellite communication that: (1) refers
12 to a clearly identified candidate for federal office; (2) is made within 60 days before a general,
13 special, or runoff election for the office sought by the candidate . . . ; and (3) is targeted to the
14 relevant electorate. 2 U.S.C. § 434(f)(3)(A); 11 C.F.R. § 100.29(a). A "clearly identified
15 candidate" means that the candidate's name, nickname, photograph, or drawing appears, or the
16 identity of the candidate is otherwise apparent through an unambiguous reference. 11 C.F.R.
17 § 100.29(h)(2). A communication is "targeted to the relevant electorate" when it can be
18 received by 50,000 or more persons in the district the candidate seeks to represent. 11 C.F.R.
19 § 100.29(b)(5). A communication that is paid for by a candidate for state or local office in
20 connection with a state or local election and does not promote, support, attack or oppose a
21 federal candidate is exempt from the statutory definition of electioneering communication. *See*
22 11 C.F.R. § 100.29(c)(5).

⁴ Respondents provided copies of several news reports and press releases from April to October 2012 concerning Crabtree's prior criticism of the two incumbent PSC commissioners. *See Resp.* at 2, Ex. 2.

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1 Persons who make aggregate disbursements exceeding \$10,000 for the cost of producing
2 and airing electioneering communications during any calendar year must, within 24 hours of
3 each disclosure date, disclose information regarding the communication. 2 U.S.C. § 434(f)(1).
4 The disclosure must include the identity of the person making the disbursement; the identity of
5 any person sharing or exercising direction or control over the activities of such person; the
6 amount and recipient of each disbursement over \$200; the election to which the communication
7 pertains and the name of the identified candidate; and the names and addresses of contributors
8 who give \$1,000 or more in the calendar year to the person making the disbursement. 2 U.S.C.
9 § 434(f)(2); 11 C.F.R. §§ 104.5(j), 104.20.

10 Here, regardless of whether the advertisement was an electioneering communication, the
11 available information shows that the costs of Crabtree's radio advertisement did not surpass the
12 \$10,000 threshold requiring disclosure. 2 U.S.C. § 434(f)(1). Therefore, Respondents had no
13 obligation to file a 24 Hour Notice with the Commission.

14 Based on the information supplied by the Complaint, \$6,529 was spent to broadcast the
15 advertisement within the electioneering communication window.⁵ Additional amounts were
16 necessarily spent to produce the advertisement, and an allocable portion of such costs would
17 also count towards the \$10,000 threshold. In order to reach \$10,000 threshold, the *prorated*
18 share of production costs would therefore have to be at least \$3,471. Although we have no

⁵ When electioneering communications are distributed both inside and outside of the electioneering communication window, only those costs incurred in connection with the distributions within the electioneering communication window are reportable. See 2 U.S.C. § 434(f)(2)(C). When necessary, costs are prorated to exclude costs for distribution outside the window. *Id.*; Table 1, *supra*, shows that \$5,913 was spent for air time that clearly fall within the electioneering communication window. Further, one day (September 7) of the 10 days covered by the disbursements included in Table 2, *supra*, falls within the window. If we allocated those costs, approximately \$616 in additional air time costs are added to the total (\$5,913 + \$616 = \$6,529).

1 information about the production costs,⁶ it appears unlikely that the costs for the advertisement
2 were sufficient to take the total advertisement costs past the \$10,000 reporting threshold. The
3 total amount of the production costs would have had to exceed \$15,000, an amount, which is
4 more than we can reasonably infer was spent on a single 30-second radio advertisement in a
5 North Dakota state election.⁷

6 Accordingly, we recommend that the Commission find that there is no reason to believe
7 that Respondants violated the Act by failing to file a 24 Hour Notice in connection with the
8 radio advertisement.⁸

9 **IV. RECOMMENDATIONS**

- 10 1. Find no reason to believe that Brad Crabtree, Crabtree for PSC and Perry Miller in
11 his official capacity as treasurer violated 2 U.S.C. § 434(f) by failing to disclose an
12 electioneering communication;
13
14 2. Approve the attached Factual and Legal Analysis;
15

⁶ We sought to obtain information about production costs through Crabtree's reports filed with the Secretary of State of North Dakota, but North Dakota state candidates are required to report only receipts, and not disbursements.

⁷ This amount is calculated by prorating the production costs based on the same ratio of the amounts spent to broadcast the advertisement within and outside the electioneering communication period, i.e., \$6,529, or approximately 20%, of the \$28,304 in broadcast costs that were within the window.

⁸ Because we conclude that the available information does not show that the \$10,000 reporting threshold was met, we do not analyze whether the communication qualifies for the regulatory exemption from the definition of electioneering communication for state and local candidate advertisements. See 11 C.F.R. § 100.29(c)(5). We also conclude the Commission need not address Respondents' claim that the activity is exempt from regulation under the definition of "federal election activity." See 2 U.S.C. § 431(20). If the "state and local candidate" exemption does not apply and the radio advertisement is an electioneering communication, there is an apparent (though not alleged) disclaimer violation in connection with the advertisement; although Crabtree identified himself and the advertisement stated that it was paid for by Crabtree for PSC, the advertisement did not include the other disclaimer requirements applicable to an electioneering communication under FECA. See 2 U.S.C. § 441d(a)(3); 11 C.F.R. § 110.11(a)(4), (b); see also 2 U.S.C. § 441d(d)(1)(A); 11 C.F.R. § 110.11(c)(3)(i). Regardless, we need not reach this issue. Even if the advertisement violated 2 U.S.C. § 441d, pursuing such a violation would not warrant the use of the Commission's limited resources. The advertisement contained a partial disclaimer, and the amount in violation is low. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). See also MUR 6126 (dismissing a complaint as an unreported \$67,275 advertisement funded by a state committee that identified a federal candidate by name and photo, because the advertisement focused on state candidate). See Statement of Reasons, Comm'r. Petersen, Bauerly, Hunter, McGahn & Weintraub at 4, MUR 6126 (RSCC).


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3. Approve the appropriate letters; and


4. Close the file.

Anthony Herman
General Counsel

2-5-13
Date


Kathleen Guith
Deputy Associate General Counsel
for Enforcement


Peter G. Blumberg
Assistant General Counsel


Kamau Philbert
Attorney

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